IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

IN RE ENDOCHOICE HOLDINGS, INC. SECURITIES LITIGATION	Civil Action File No. 2016CV277772 (Consolidated with Civil Action No. 2016cv281193) CLASS ACTION

ORDER ON MOTIONS TO DISMISS

Before this Court is a Corrected Motion to Dismiss Plaintiffs' Consolidated Complaint by EndoChoice Defendants and also Underwriter Defendants' separate Motion to Dismiss the Consolidated Class Action Complaint. Having considered the briefs submitted and oral arguments, the Court finds as follows:

EndoChoice Holdings, Inc. ("EndoChoice"), a medical device company, offers products such as colonoscopes used by gastrointestinal caregivers. In 2015, EndoChoice sought funding through an Initial Public Offering (the "IPO"). EndoChoice filed a Registration Statement with the SEC, effective June 4, 2015, and filed a Prospectus with the SEC on June 5, 2015, offering 6,350,000 shares of EndoChoice common stock (collectively, the "Offering Materials"). The initial offering price was $15 per share. Defendants J.P. Morgan Securities, LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, William Blair & Company, LLC, and Stifel, Nicolaus & Company, Incorporated served as underwriters for the IPO (collectively, "Underwriter Defendants"). Following the IPO, share value fell. By July 13, 2016, the price of EndoChoice stock had fallen to below the initial offering price and on September 27, 2016, EndoChoice announced it had agreed to be bought by Boston Scientific for $8.00 per share.

Plaintiffs, all shareholders, filed this class action asserting that EndoChoice and nine of its directors and officers ("EndoChoice Defendants") along with Underwriter Defendants have violated Sections 11, 12(a)(2), and 15 of the federal Securities Act of 1993 (the "1933 Act"). Plaintiffs contend that Defendants included materially false and misleading information in their Offering Materials about the quality and design of a new full spectrum endoscopy system (the "FUSE system") and the ability of its sales force to market and sell the FUSE system and omitted material information about the FUSE system and the sales force potential.

In their Motions to Dismiss, Defendants argue that this Court does not have subject matter jurisdiction because the class action falls within an exception to concurrent jurisdiction of state and federal courts under the 1933 Act. Although this argument has been raised in many jurisdictions, this appears to be a matter of first impression for the Georgia courts. Defendants argue the federal pleading standard, not Georgia's, applies and that Plaintiffs have failed to state a claim under either standard. Each of these arguments is addressed in turn.

SUBJECT MATTER JURISDICTION

Section 22 of the 1933 Act provides for concurrent jurisdiction over claims brought pursuant to the 1933 Act, "except as provided in ***Section 16*** of this title with respect to covered class actions[1]...." The Court recognizes that a split exists within the courts nationwide as to the interpretation of Section 16 of the 1933 Act, as amended, concerning concurrent jurisdiction. Defendants interpret Section 16 to mean that all covered class actions would be exempt from concurrent jurisdiction, that is, only federal courts could hear the actions. Had Congress wished to eliminate broadly the concurrent jurisdiction provided in Section 22 for all covered class

[1] A "covered class action" seeks damages on behalf of more than 50 people, and involves a "covered security" which is traded nationally and listed on a regulated national exchange. See Section 16(f)(2) and (3); *Kircher v. Putnam Funds Trust,* 547 U.S. 633, 637 (2006). The parties do not dispute this action meets the definition of a covered class action.

actions, it could have clearly and unmistakably said so or could have referred directly to Section 16(f)(2) that defines covered class actions. Instead, the statute refers only to Section 16 and so the Court must look to the whole of Section 16 to see what, if any, exemptions from concurrent jurisdiction it provides.

First, Section 16(a) states that rights and remedies are in addition to other rights and remedies, except as provided in section (b), which is not relevant to this case. Section 16(b) is a preclusion provision. It "makes some state-law claims nonactionable through the class-action device in federal as well as state court." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 637 (2006). This subsection is also inapplicable since Plaintiffs have only raised claims under federal law. Section 16(c) states that "[a]ny covered class action brought in any State court involving a covered security, as set for in subsection (b), shall be removable to the Federal district court…" but no party in this case has sought removal and this case does not involve a covered class action of the type described in subsection (b), i.e, a class action based on state law.[2] Section 16(d) provides notwithstanding (b) and (c), that certain covered class actions which have state law claims may be maintained in state or federal court. Section 16(e) preserves jurisdiction of a states' securities agency to bring enforcement actions. Section 16(f) defines terms, including covered class actions. Having considered Section 16 in its entirety, the Court finds nothing describing the case at hand or otherwise supporting an exemption from concurrent jurisdiction. The Court finds the reasoning of the opinion of the California Court of Appeals in

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[2] Defendants have sought dismissal, not removal, of Plaintiffs' claims. This is not surprising given that the federal courts in the Northern District of Georgia have determined that class actions asserting 1933 Act claims cannot be removed to federal court, thereby acknowledging that state and federal courts have concurrent jurisdiction. See *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 27229011, at *11 (N.D. Ga. Sept. 14, 2007); *Williams v. AFC Enterps., Inc.*, No. 103-CV-2490-TWT, 2003 WL 24100302 (N.D. Ga. Nov. 20, 2003); *Martin v. BellSouth Corp.*, No. 1:03-CV-728, 2003 WL 26476752 at *2 (N.D. Ga. July 3, 2002).

Luther v. Countrywide Fin. Corp., 195 Cal. App. 4th 789 (2011), to be persuasive. This Court has subject matter jurisdiction and the Motions to Dismiss for lack thereof are **DENIED**.

THE APPLICABLE PLEADING STANDARD

Defendants argue that the federal pleading standards should apply while Plaintiffs contend that Georgia's notice pleading applies. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 372 (1990)) (citations omitted). "States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.* Both parties cite *Brown v. Western Railway*, 338 U.S. 294 (1949) as support for their respective positions. In *Brown*, the Supreme Court held that the FELA claim at issue was subject to the federal pleading standards rather than the state standards. Defendants point to *Brown* as support for the federal procedural standard because a federal statute was involved there as it is in this case. Plaintiffs counter that in *Brown* the circumstances were the reverse of the situation here: the state pleading standard was more stringent than the federal standard. "Even where a claim is governed by substantive federal law, a state may apply its own procedural rules in its own courts, if those procedures do not defeat the objectives of the federal law." *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 243 Ga. App. 85, 87 (2000) (citing *Felder v. Casey,* 487 U.S. 131, 138 (1988)) (finding Georgia's procedural rule allowing a preliminary appeal from an order compelling arbitration was not preempted by the Federal Arbitration Act). Defendants have not cited a case in which a state court applied federal pleading standards in a state court for claims under the 1933 Act. The Court will apply Georgia's notice pleading standard to determine whether Plaintiffs have stated a claim for relief.

> "[A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint

> disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought… In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor."

Scouten v. Amerisave Mortgage Corp., 238 Ga. 72, 73 (2008) (quoting *Anderson v. Flake,* 267 Ga. 498, 501 (1997)); *see also* O.C.G.A. §9-11-12(b)(6). The objective of the notice pleading standard is to "give the defendant fair notice of what the claim is and a general indication of the type of litigation involved; the discovery process bears the burden of filling in details." *Charles H. Wesley Educ. Found., Inc. v. State Election Bd.*, 282 Ga. 707, 713(1) (2007).

STATUTORY STANDING AND TRACEABILITY

Under Section 11 of the 1933Act, if a registration statement for a security contains an untrue statement of material fact or omits a material fact, any person acquiring such security pursuant to an initial public offering may sue certain involved parties. There is a presumption that such a purchaser relied on the misstatement or omission in the registration statement. See *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1271 (11th Cir. 2007).

Likewise, under Section 12(a)(2), any person who offers or sells a security by means of a prospectus or oral communication which includes an untrue statement of material fact or omits a material fact may be liable to the purchaser of that security. Thus, the purchaser must trace its purchase back to the seller and the sale must have been effectuated by means of a prospectus or oral communication. See *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010).

The Complaint here makes conclusory allegations that Plaintiffs purchased the EndoChoice shares "pursuant and /or traceable to the defective Offering Materials" but does not plead the date of purchase, the purchase price, or the seller's identity. The EndoChoice

Defendants acknowledge in their brief that Plaintiffs' conclusory statement as to traceability "might suffice under a more lenient state-law pleading standard." This Court agrees that traceability has been pled sufficiently under Georgia procedural standards to give Defendants notice of the claims against them.

While Section 11 of the 1933 Act specifically includes underwriters, Underwriter Defendants here seek dismissal of the Section 12 claim against them because Plaintiffs have not alleged that they acquired title to the shares from Underwriter Defendants and therefore, Underwriter Defendants were not statutory "sellers" as defined in Section 12(a)(2). Underwriter Defendants acknowledge that the Complaint does allege that each of the Underwriter Defendants ""offered and sold shares" pursuant to the defective Offering Materials. The Complaint also alleges that Underwriter Defendants met with potential investors to give them information about EndoChoice. This Court agrees with Plaintiffs that Underwriter Defendants' status as a seller has been pled sufficiently under Georgia procedural standards to give Underwriter Defendants notice of the claims against them under Section 12 as well as Section 11.

As such, Defendants' Motions to Dismiss for failure to plead adequately statutory standing and traceability are **DENIED**.

MISREPRESENTATIONS AND OMISSIONS

To state a claim under Sections 11 or 12 of the 1933 Act, Plaintiffs must allege that the Offering Materials contain an untrue statement of material fact or omit a material fact necessary to make the statement not misleading. "A false statement or omission is considered 'material' if its disclosure would alter the total mix of facts available to an investor and 'if there is a substantial likelihood that a reasonable shareholder would consider it important' to an investment decision." *In re Sci.-Atlanta, Inc. Sec. Litig.*, 239 F. Supp. 2d 1351, 1359 (N.D. Ga. 2002), aff'd

sub nom. *Phillips v. Sci.-Atlanta, Inc.*, 374 F.3d 1015 (11th Cir. 2004). "Generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are not actionable because they are immaterial." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003) (noting the company "was under no duty to cast its business in a pejorative, rather than a positive, light"). As to omissions, "the appropriate inquiry is whether—given the timely inclusion of meaningful cautionary language within 'the total mix of information'—the omitted fact 'is one [that] a reasonable investor would consider significant in the decision to invest [or divest].'" *Rubinstein v. Collins*, 20 F.3d 160, 171 (5th Cir. 1994).

First, Defendants contend that many of their allegedly misleading statements were mere puffery and therefore are not material as a matter of law. Puffery includes "soft" statements "incapable of objective verification, that courts routinely dismiss as vague statements of corporate optimism." *In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 2d 1360, 1378 (N.D. Ga. 2005). "General statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery,' meaning that they are 'too general to cause a reasonable investor to rely upon them.'" *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 344 (S.D.N.Y. 2015).; see also *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003) ("The generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are not actionable because they are immaterial."). Defendants argue statements describing EndoChoice as a "world class" organization, describing the FUSE system as "disruptive," "innovative," and "compelling," and capable of setting "a new standard of care," and describing the sales force as "highly adaptable," "experienced," "proven," and "poised to contribute to future sales growth" are mere puffery, not material, and are therefore inactionable under the 1933 Act as immaterial.

Next, Defendants argue for application of the "bespeaks caution" common law doctrine under which cautionary language in Offering Materials negates the materiality of the more optimistic "forward-looking" projections. See *In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 2d 1360, 1366–67 (N.D. Ga. 2005); see also *Saltzberg v. TM Sterling/Austin Assocs., Ltd.*, 45 F.3d 399, 400 (11th Cir. 1995) (citing *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993)) ("When an offering document's projections are accompanied by meaningful cautionary statements and specific warnings of the risks involved, that language may be sufficient to render the alleged omissions or misrepresentations immaterial as a matter of law."). Defendants rely on forty-three pages of "Risk Factors" contained in the Offering Materials, which disclose quality control issues with the initial FUSE system and include a statement that the quality assurance testing program may not detect adequately all defects. The Offering Materials also explain the anticipated challenges for the sales force in transitioning from selling less expensive equipment to selling the more expensive new FUSE system. Under the bespeaks caution doctrine, Defendants argue that a reasonable investor relying on the total mix of information provided—both optimistic forward-looking projections and disclosed risk factors—would not base their investment-making decision solely on the generalized expressions of optimism. See *Rubinstein v. Collins*, 20 F.3d 160, 167 (5th Cir. 1994) (noting the "bespeaks caution" doctrine merely reflects the unremarkable proposition that statements must be analyzed in context). "Although such a defendant is under no duty to disclose every fact or assumption underlying a prediction, he must disclose material, firm-specific adverse facts that affect the validity or plausibility of that prediction." *Id.* at 170.

Finally, Defendants argue certain statements in the Offering Materials are inactionable opinions, not facts, as required for claims under Sections 11 or 12 of the 1933 Act. "A

statement of fact expresses certainty about a thing, whereas a statement of opinion conveys only an uncertain view as to that thing." *Omnicare, Inc. v. Laborers Council Constr. Ind. Pension Fund*, 135 S. Ct. 1318, 1325 (2015). "[A] sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong." *Id.* at 1327. However, a party can still be liable under Section 11 for an untrue statement of fact which, while not stated, is necessarily assumed in an opinion statement. For example, the opinion stated could be a misrepresentation of the speaker's true state of mind at the time the statement was made. *Id.* Further, an opinion statement may contain an embedded factual misrepresentation. *Id.* (giving the example of an opinion statement that includes facts ("I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access") includes a stated fact that the technology is patented).

Additionally, a party can be liable under Section 11 if they omit facts necessary to make its opinion not misleading. *Id.* For example, "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience." *Id.* at 1328. For example, the statement "I believe our conduct is lawful" could lead a reasonable investor to believe the person expressing that opinion has consulted an attorney. If the speaker expressed that opinion without disclosing (1) the issuer has not consulted an attorney or (2) the issuer actually received contrary advice from an attorney or enforcement agency, the opinion could be misleading based on these material omissions. *Id.* at 1329. However, the issuer does not have the burden to disclose every fact in conflict with the issuer's opinion and not every fact

must support the opinion. *Id.* at 1329. Instead, "an investor reads each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information." *Id.* at 1330. Thus, the purchaser must allege a fact that was omitted and the Court must determine if "the omitted fact would have been material to a reasonable investor—i.e., whether 'there is a substantial likelihood that a reasonable investor would consider it important.'" *Id.* at 1333.

THE CLAIMS

Turning to the Complaint, Plaintiffs identify many different statements which they claim are false or misleading. These statements concern three general areas: statements regarding the quality, design, and marketability of the FUSE system; statements regarding the quality of EndoChoice's sales force; and statements regarding EndoChoice's ability to generate growth in FUSE system sales.

The FUSE System

The Complaint challenges representations in the Offering Materials describing the FUSE system as a "quality" and "disruptive" product providing "full spectrum" viewing, "crisp, clear imaging and lighting," "compelling, differentiated clinical efficacy," "ease of use," and a "cutting edge graphics processing and computing platform." The Offering Materials state that EndoChoice "intend[s] to leverage … FUSE technology to set a new standard of care of the global GI market" and state that EndoChoice "believe[s] that the improved clinical and cost outcomes that FUSE enables will lead to its widespread adoption over time." The Offering Materials also tout EndoChoice's ability to leverage the FUSE system to its competitive advantage—noting that they would build "what we believe is a world class organization capable of driving sustainable global growth that can be leverage to drive increased profitability" and

"[w]e believe the combination of a broad and innovative product portfolio spanning the entire GI procedure cycle coupled with our disruptive FUSE technology gives us a competitive advantage that will enable us to gain further share of our customers' spend." Plaintiffs allege these statements were "all materially false and misleading when made because, *inter alia*, they failed to disclose that, at the time of the Offering, the FUSE system suffered from a variety of significant product defects, reliability issues, and basic design flaws" and other "undisclosed quality problems afflicting the FUSE system." The Offering Materials disclosed past problems with the FUSE system and noted the risk of future product issues and its impact on EndoChoice's operations and financial condition.[3] The Offering Materials' summary of principal risks includes that "there can be no assurance that the FUSE system will gain widespread adoption or that we will be successful in our efforts to commercialize our FUSE system." The summary also generally warns of the risk that EndoChoice "may not be able to … improve or enhance existing products." The specific Risk Factor as to product quality issues and defects states:

> ***Product quality issues or product defects may harm our business, results of operation and financial condition.***
>
> Certain of our medical device products are highly complex and incorporate sophisticated technology, including hardware and software. Software contains, particularly in the periods subsequent to the initial launch, bugs that can unexpectedly interfere with the device's operation. Our quality assurance testing programs may not be adequate to detect all defects, which might interfere with customer satisfaction, reduce sales opportunities, harm our marketplace reputation, increase warranty repairs or reduce gross margins. In the past, we have had to replace certain components and provide remediation in response to the discovery of defects or bugs in products that we had shipped, including initial shipment of our Fuse® system. An inability to cure a product defect could result in the financial failure of products, a product recall, temporary or permanent withdrawal of a product from a market, damage to our reputation or our brand,

[3] The Complaint quotes only part of the Risk Factors. However, the complete Offering Materials were attached to EndoChoice's Answer and Defenses to the Consolidated Complaint, and therefore can be considered on a motion to dismiss. See *Islam v. Wells Fargo Bank, N.A.*, 327 Ga. App. 197, 197 (2014).

> inventory costs or product engineering expenses, any of which could have a material impact on our business, results of operation and financial condition.

However, Plaintiffs also argue the Offering Materials omitted material facts about defects in the FUSE system that existed at the time of the IPO and did not reveal the lack of the second generation FUSE systems (the "Gen2") available for demonstrative purposes by the sales force at the time of the IPO. Plaintiffs allege there were design, reliability, and quality problems with the Gen2 at the time of the IPO that were not disclosed. These defects included: poor quality imaging; a defective scope design that made it harder for GI physicians (especially women doctors) to comfortably maneuver the scope; low quality component angulation cables that controlled the maneuverability of the scope inside the GI tract that were constantly breaking; poorly designed snares (used to remove polyps) that regularly got stuck in the GI tract; defective imaging processors that frequently froze in the middle of an endoscopy procedure; electrical problems causing the lights to not turn off or emit too much heat, and defective glue that did not adhere. Plaintiffs also allege EndoChoice did not disclose that demonstrative units of its Gen2 touted in the Offering Materials would not be available to sales personnel in the field until July of 2015 even though the Gen2 was "launched" in January of 2015. Plaintiffs in their Complaint allege this omission was material because it would be difficult to sell the Gen2 without field demonstrations and the lack of demonstrative units made "all the more improbable that the Company could realize any material growth in FUSE sales until sometime in mid-to late 2016."

The Court finds the adjectives used to describe the FUSE system to be inactionable puffery. To the extent the Offering Materials predict future corporate success based on the FUSE system, the Risk Factors support the application of the bespeaks-caution doctrine. However, the Court cannot say at this stage in the litigation whether disclosures in the Offering Materials detailing Gen2's present day defects and unavailability for demonstration would have

altered the total mix of information and thus would have influenced a reasonable investor's decision-making.

The Sales Force

The Offering Materials describe EndoChoice's sales force as "proven" and "poised to contribute to future sales growth," its sales and marketing professionals as "experienced," and its sales organization as "highly adaptable." The Complaint challenges the representation that "We have made significant investments over the past several years in our research and development, sales and marketing and manufacturing operations to build what we believe is a world class organization capable of driving sustainable global growth that can be leveraged to drive increased profitability." Plaintiffs contend these statements are materially misleading because at the time of the IPO, the sales force was not properly organized, lacked the skill and experience to sell more expensive medical equipment like the FUSE system, and did not have demonstrative units needed to accelerate growth in FUSE system sales. Plaintiffs allege the Offering Materials did not disclose the problems with transitioning tenured sales members to their new role nor did it disclose the high turnover and attrition rates within the sales force.

The Offering Materials' summary of principal risks did include an acknowledgement that EndoChoice "may not be able to expand, manage and maintain our direct sales and marketing organizations" or "compete effectively in selling our GI products and services." The specific Risk Factors contained the following warning:

> ***If we are unable to expand, manage and maintain our direct sales and marketing organization we may not be able to generate anticipated revenue.***
>
> As of March 31, 2015, our direct sales and marketing organizations consisted of 103 employees, having increased from 65 employees as of December 31, 2012, and covered 50 sales territories in the United States. Our future success will be directly dependent upon the sales and marketing efforts of our employees. If our

> sales representatives fail to adequately promote, market and sell our products, our sales may suffer.
>
> In order to generate our anticipated sales, we will need to expand the size and geographic scope of our direct sales organization. There is significant competition for qualified and experienced sales personnel. Once hired, the training process is lengthy because it requires significant education of new sales representatives to achieve the level clinical competency with our products expected by GI specialists. Upon completion of the training, our sales representatives typically require lead time in the field to grow their network of accounts and achieve the productivity levels we expect them to reach in an individual territory. If we are unable to attract, motivate, develop and retain a sufficient number of qualified sales personnel, or if our sales representatives do not achieve the productivity levels in the time period we expect them to reach, our revenue will not grow at the rate we expect and our business, results of operations and financial condition will suffer. Also, to the extent we hire sales personnel from our competitors, we may be required to wait until applicable non-competition provisions have expired before deploying such personnel in restricted territories or incur costs to relocate personnel outside of such territories. In addition, we have been in the past and may be in the future, subject to allegations that these new hires have been improperly solicited, or that they have divulged to us proprietary or other confidential information of their former employers. Any of these risks may adversely affect our ability to increase sales of our products. If we are unable to expand our sales and marketing capabilities, we may not be able to effectively commercialize our products, which would adversely affect our business, results of operations and financial condition.
>
> In addition, we are in the process of transitioning our sales force from selling less expensive single use products to nurses and procedure room supervisors to also selling more complex capital equipment (such as our Fuse® system) to GI specialists and senior administrators. These are significant differences in these processes, such as a longer sales cycle, the evaluation of possible financing options, and more requirements for approvals in the purchasing decisions for more expensive capital equipment. If we are unable to increase the effectiveness of our sales force, our business, results of operations and financial condition may be adversely affected.

However, Plaintiffs allege the Offering Materials omitted certain material facts about the sales force, including that the sales force was in disarray, lacked experienced personnel, suffered high turnover and attrition rates, was not sufficiently trained in selling more complex products like the FUSE system, and was given unrealistic sales quotas. EndoChoice did not disclose the difficulty they were having attracting and retaining new sales personnel with the necessary skills

and experience to sell the FUSE system. Plaintiffs claim these omissions are material because generally nine months were needed for a salesperson to close the sale of a FUSE system, and the average tenure of a sales professional at EndoChoice was less than six months.

The Court finds that descriptive adjectives describing the sales force as "experienced," "proven," and "highly adaptable" are inactionable puffery. Likewise, statements that the sales force was a part of what made EndoChoice a "world class organization capable of driving sustainable global growth that can be leveraged to drive increased profitability" and that the sales force was "poised to contribute to future sales growth" are not actionable under the bespeaks-caution doctrine. The materiality of these optimistic, forward-looking statements was negated as a matter of law by the clear risk factors describing both the current challenges EndoChoice was facing in transitioning a sales force to sell a more expensive and complex product and to target the sales to more senior medical professionals. However, as noted above, whether the lack of functional Gen2 demonstrative units for use by the sales force was a material fact that, if disclosed, would have altered the total mix of information available to a reasonable investor, is yet to be decided.

Anticipated Growth in FUSE Sales

Finally, the Complaint alleges the Offering Materials contain false statements or material misrepresentations about EndoChoice's ability to grow and become profitable. The Offering Materials state:

> We expect revenue to increase in the future as we expand our sales, marketing and distribution capabilities to support growth in the United States and internationally as our FUSE system becomes more widely adopted. We expect revenues to increase during the remainder of 2015 from 2014 levels due to the commercialization of FUSE, as well as a growing base of customers for our single-use infection control and device products and our pathology services.

The Complaint alleges these statements are materially untrue because EndoChoice failed to disclose the product quality and design problems and sales force issues (including lack of adequate supplies of demonstrative units) that would significantly undermine any reasonable belief that sales of the FUSE systems could or would be accelerated through the remainder of 2015. These two sentences are forward-looking opinions. However, a reasonable investor could understand this opinion to be based on the existence of a market-ready FUSE system and a capable sales force. Plaintiffs have pointed to facts contrary to this position. Thus, it is possible that omissions related to the FUSE system's quality and availability and the aptitude of the sales force could render these opinions materially misleading.

Defendants' Motions to Dismiss for failure to plead adequately material misrepresentations or omissions are **DENIED**.

SO ORDERED this 2 day of May, 2017.

JUDGE GOGER
on behalf of
ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

Copies to: ALL REGISTERED USERS OF EFILEGA.

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